

U. S. DEPARTMENT OF LABOR
Employees' Compensation Appeals Board

In the Matter of PAUL G. KINGSLEY and U.S. POSTAL SERVICE,
POST OFFICE, Alva, Okla.

*Docket No. 95-2975; Submitted on the Record;
Issued January 21, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether appellant sustained greater than a 19 percent permanent impairment of the right lower extremity for which he received a schedule award.

On July 24, 1987 appellant, then a 36-year-old letter carrier, sustained a sprained ankle in the performance of duty when he accidentally stepped into a hole.

On November 14, 1988 appellant filed a claim for a schedule award based on partial permanent impairment of his right leg.

In a report dated January 13, 1990, Dr. J.D. McGovern, an Office of Workers' Compensation Programs referral physician whose specialty is not indicated in the record, provided a history of appellant's condition and related appellant's complaints that he had been in constant pain of his right ankle since surgery in September 1987 and that the pain was getting worse. He indicated that measurements of range of motion of the right ankle were inconsistent and unreliable because of lack of effort.

In a report dated February 2, 1990, Dr. R.S. Meador, the district medical adviser and a Board-certified internist, opined that appellant had a two percent permanent impairment of the lower right extremity based upon Dr. McGovern's report. He indicated that the two percent permanent impairment was based upon pain.

By decision dated February 28, 1990, the Office granted appellant a schedule award based upon a two percent permanent impairment of the right leg.

By decision dated April 18, 1991, an Office hearing representative remanded the case for further development.

In a report dated December 14, 1990, Dr. Richard W. Loy, a physician whose specialty is not indicated in the record, provided findings on examination and opined that appellant had a

42.5 percent permanent impairment of the right lower extremity. He based his evaluation on the tables on page 36 of the second edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.¹

By letter dated September 23, 1991, the Office referred appellant to Dr. Newt Wakeman, Jr., a Board-certified orthopedic surgeon, for a second opinion examination and evaluation of appellant's permanent impairment.

In a report dated November 5, 1991, Dr. Wakeman provided a history of appellant's condition and findings on examination. Dr. Wakeman stated:

“[Appellant's] plantar flexion is to 40 [degrees] with extension to 5 [degrees]. His inversion [is] 15 [degrees], eversion [is] 10 [degrees].

“Based of the loss of dorsiflexion would be assigned 6 [percent] impairment to the lower limb, 3 [percent] due to loss of inversion and 2 [percent] to loss of eversion. This adds to 11 [percent]. Impairment based on pain which effects the area supplied by the superficial peroneal (5 [percent]), sural nerve (5 [percent]) and common peroneal (5 [percent]), each times 60 [percent] for pain which interferes with activity would be 3 [percent] + 3 [percent] + 3 [percent] = 9 [percent] which ... total [a] *combined value* of 19 [percent] to the lower limb or 8 [percent] whole person.” (Emphasis in the original.)

In a report dated December 1, 1991, Dr. Meador opined that appellant had a 19 percent permanent impairment of the right lower extremity based upon Dr. Wakeman's report and the A.M.A., *Guides* (3d ed. 1988).² He indicated that appellant had a 9 percent permanent impairment due to pain related to the superficial peroneal nerve, sural nerve and common peroneal nerve based upon Table 10 on page 40 in the A.M.A., *Guides* and 11 percent permanent impairment based upon a 6 percent impairment of extension of the ankle, 3 percent for inversion of the ankle and 2 percent for eversion of the ankle.

By decision dated December 12, 1991, the Office granted appellant an additional 17 percent permanent impairment of the right leg for 48.96 weeks of compensation benefits which, combined with the 2 percent permanent impairment previously granted, equalled a 19 percent permanent impairment.

By letter dated December 2, 1992, appellant requested reconsideration of the Office's schedule award decision.

¹ The Board notes that the edition of the A.M.A., *Guides* in effect at that time was the third edition which became effective in 1988.

² The Board notes that Dr. Meador used the incorrect edition of the A.M.A., *Guides* in this case because the Third Edition, Revised was effective as of September 1991; see FECA Bulletin No. 91-27, September 18, 1991. However, the A.M.A., *Guides* tables which are applicable in this case are the same in both the Third Edition and the Third Edition, Revised. The percentage of appellant's impairment is the same regardless of which of the two editions is used.

In a report dated September 14, 1992, Dr. Aly M. Mohsen, a Board-certified physiatrist, provided a history of appellant's condition and findings on examination and opined that appellant had a 34 percent permanent impairment of the right lower extremity based upon the A.M.A., *Guides* (3d ed., rev. 1991).

In letters dated March 27 and 29, 1995, the district medical director, Dr. Daniel Zimmerman, noted that Dr. Mohsen had provided incomplete physical findings and that his evaluation was not in accord with the A.M.A., *Guides*. He indicated that appellant needed to be reevaluated by a physician skilled in the use of the A.M.A., *Guides* and noted that the current applicable edition of the A.M.A., *Guides* was the fourth edition, which was effective in 1993.

By letter dated April 21, 1995, the Office referred appellant to Dr. John A. Gragnani, a Board-certified physiatrist, for an examination and evaluation of his permanent impairment based upon the fourth edition of the A.M.A., *Guides*.

In a report dated May 5, 1995, Dr. Gragnani provided a history of appellant's condition and findings on examination. He indicated that he had applied the findings to the A.M.A., *Guides* (4th ed. 1994), pages 75-93 and tables 20 and 21 on page 151. Dr. Gragnani stated:

"There is so much subjectivity to [appellant's] complaints of pain and to his distribution of sensory examine, that these values cannot in my opinion be used successfully in the [A.M.A., *Guides*] to calculate an impairment rating. Furthermore, [appellant] restricted movement to the ankle in an attempt to measure the actual goniometric measurements which makes measurement of the range of motion also in my opinion difficult on a precise basis. From an objective observational standpoint, the ankle joint appears to be normal in appearance and the ankle mortis also appears to be normal in appearance. There is obvious evidence of a prior surgical treatment on the lateral side of the ankle.

"From an observational standpoint, [appellant] has functional use of the right lower extremity at the ankle level.

"Based on this information and referring to the [A.M.A., *Guides*, 4th ed. 1993], I would suggest that the prior rating of 19 [percent] for the ankle would not be unreasonable assuming that [appellant] does have pain with use of the ankle joint and obviously has had prior ligamentous surgery. There is no deformity or malposition during observed ambulation that would give any additional rating than this and I think that a reconsideration to a higher level of impairment is not in this case appropriate."

By decision dated June 8, 1995, the Office denied modification of its December 12, 1991 decision on the grounds that the weight of the medical evidence of record did not support any increase in impairment of the right ankle.³

³ The Board notes that appellant has submitted new evidence on appeal (medical evidence in docket file) which was not before the Office at the time of its June 8, 1995 decision. The Board has no jurisdiction to consider this

The Board finds that appellant sustained greater than a 19 percent permanent impairment of the right lower extremity.

An employee seeking compensation under the Act⁴ has the burden of establishing the essential elements of his claim by the weight of the reliable, probative and substantial evidence,⁵ including that he sustained an injury in the performance of duty as alleged and that his disability, if any, was causally related to the employment injury.⁶

Section 8107 of the Act provides that if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.⁷ Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the A.M.A., *Guides* as a standard for evaluating schedule losses and the Board has concurred in such adoption.⁸

Before the A.M.A., *Guides* may be utilized, however, a description of appellant's impairment must be obtained from appellant's attending physician. The Federal (FECA) Procedure Manual provides that in obtaining medical evidence required for a schedule award the evaluation made by the attending physician must include a "detailed description of the impairment which includes, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent description of the impairment."⁹ This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.¹⁰

In this case, by decision dated February 28, 1990, appellant received a schedule award based upon a two percent permanent impairment of the right lower extremity. Subsequently, the Office undertook further development of the case. By letter dated September 23, 1991, the Office referred appellant to Dr. Wakeman for a second opinion examination and evaluation of his permanent partial impairment.

evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35 (1952).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathanial Milton*, 37 ECAB 712, 722 (1986).

⁶ *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

⁷ 5 U.S.C. § 8107(a).

⁸ *James Kennedy, Jr.*, 40 ECAB 620, 626 (1989); *Charles Dionne*, 38 ECAB 306, 308 (1986).

⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(c) (March 1995); *see John H. Smith*, 41 ECAB 444, 448 (1990).

¹⁰ *Alvin C. Lewis*, 36 ECAB 595, 596 (1985).

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“Based on the loss of dorsiflexion would be assigned 6 [percent] impairment to the lower limb, 3 [percent] due to loss of inversion and 2 [percent] to loss of eversion. This adds to 11 [percent]. Impairment based on pain which effects the area supplied by the superficial peroneal (5 [percent]), sural nerve (5 [percent]) and common peroneal (5 [percent]), each times 60 [percent] for pain which interferes with activity would be 3 [percent] + 3 [percent] + 3 [percent] = 9 [percent] which ... total [a] *combined value* of 19 [percent] to the lower limb or 8 [percent] whole person.” (Emphasis in the original.)

In a report dated December 1, 1991, Dr. Meador, the Office's district medical adviser and a Board-certified internist, opined that appellant had a 19 percent permanent impairment of the right lower extremity based upon Dr. Wakeman's report and the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He indicated that appellant had 9 percent permanent impairment due to pain related to the superficial peroneal nerve, sural nerve and common peroneal nerve based upon Table 10 on page 40 in the A.M.A., *Guides*¹¹ and 11 percent permanent impairment based upon a 6 percent impairment of extension of the ankle (loss of dorsiflexion), 3 percent for inversion of the ankle and 2 percent for eversion of the ankle. However, there is one mistake in Dr. Meador's calculation of impairment. The percentage of impairment based on loss of dorsiflexion should be 7 percent, according to Table 37 at page 66 of the third edition, revised of the A.M.A., *Guides*,¹² rather than the 6 percent assigned by Dr. Meador. Therefore, the medical evidence establishes that appellant sustained a 20 percent total permanent impairment of the right lower extremity, rather than the 19 percent awarded by the Office.

The opinion of Dr. Loy is of limited probative value in that Dr. Loy had used the wrong edition of the A.M.A., *Guides* in making his December 4, 1990 evaluation of appellant's permanent impairment. The opinion of Dr. Mohsen is also of limited probative value as he failed to provide complete findings on examination and also failed to provide an explanation of how his assessment of permanent impairment was derived in accordance with the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses.¹³

¹¹ As noted above, Dr. Meador had used the third Edition of the A.M.A., *Guides*.

¹² The corresponding table in the third edition used by Dr. Meador is Table 33 at page 59.

¹³ See *James Kennedy, Jr.*, *supra* note 8 (finding that an opinion which is not based upon the standards adopted by the Office and approved by the Board as appropriate for evaluating schedule losses is of little probative value in determining the extent of a claimant's permanent impairment).

The June 8, 1995 decision of the Office of Workers' Compensation Programs is modified to reflect that appellant had a total permanent impairment of the right lower extremity of 20 percent and the case is remanded to the Office for calculation of the additional compensation benefits to which appellant is entitled.

Dated, Washington, D.C.
January 21, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member